



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD-2022-OS-0082]

RIN 0790-AL44

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense (OSD), Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The Department of Defense (Department or DoD) is issuing a final rule to amend its regulations to exempt portions of the system of records titled CIG-30, "OIG Data Analytics Platform," from certain provisions of the Privacy Act of 1974.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Rahwa Keleta, Privacy and Civil Liberties Division, Directorate for Privacy, Civil Liberties and Freedom of Information, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700; OSD.DPCLTD@mail.mil; (703) 571-0070.

SUPPLEMENTARY INFORMATION:

Discussion of Comments and Changes:

The proposed rule published in the Federal Register on July 20, 2022 (87 FR 43228-43231). Comments were accepted for 60 days until September 19, 2022. No comments were received. However, DoD is making one administrative change to § 310.28(c)(10) from the proposed rule by adding the acronym "OIG" to the *System identifier and name* to match the system of records

notice with the same name that published in the Federal Register on July 20, 2022 (87 FR 43255-43258).

I. Background

In finalizing this rule, DoD is seeking to exempt portions of this system of records titled, CIG-30, OIG Data Analytics Platform, from certain provisions of the Privacy Act. This system of records covers DoD's maintenance of records about individuals who are subject and/or associated with a matter involved in DoD Office of the Inspector General (OIG) audits, evaluations, investigations, and reviews. The records collected will assist with the performance of audits, evaluations, investigations, and reviews of DoD programs, functions, and individuals.

II. Privacy Act Exemption

The Privacy Act permits Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including the provisions providing individuals with a right to request access to and amendment of their own records and accountings of disclosures of such records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process to provide public notice and an opportunity to comment on the proposed exemption. The OSD is amending 32 CFR part 310 to add a new Privacy Act exemption rule for the CIG-30, "OIG Data Analytics Platform," system of records. The DoD is adding an exemption for this system of records pursuant to 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2) because some of its records may contain investigatory material compiled for law enforcement purposes and classified national security information.

REGULATORY ANALYSIS

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that

maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this rule is not a significant regulatory action under these Executive Orders.

Congressional Review Act (5 U.S.C. 804(2))

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the Federal Register, whichever is later. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532(a)) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates may result in the expenditure by State, local and tribal governments in the aggregate, or by the private sector, in any one year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601 *et seq.*)

The Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency has certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule is concerned only with the administration of Privacy Act

systems of records within the DoD. Therefore, the Regulatory Flexibility Act, as amended, does not require DoD to prepare a regulatory flexibility analysis.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. 3501 et seq.)

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.) was enacted to minimize the paperwork burden for individuals; small businesses; educational and nonprofit institutions; Federal contractors; State, local and tribal governments; and other persons resulting from the collection of information by or for the Federal government. The Act requires agencies obtain approval from the Office of Management and Budget before using identical questions to collect information from ten or more persons. This rule does not impose reporting or recordkeeping requirements on the public.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or affects the distribution of power and responsibilities between the Federal government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

PART 310—PROTECTION OF PRIVACY AND ACCESS TO AND AMENDMENT OF INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF 1974

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Section 310.28 is amended by adding paragraph (c)(10) to read as follows:

§ 310.28 Office of the Inspector General (OIG) exemptions.

* * * * *

(c) * * *

(10) *System identifier and name.* CIG-30, “OIG Data Analytics Platform.”

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1); (e)(2); (e)(3); (e)(4)(G), (H), and (I); (e)(5); (e)(8); (f) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). This system of records is exempt from 5 U.S.C. 552a(c)(3); (d)(1), (2), (3), and (4); (e)(1); (e)(4)(G), (H), and (I); and (f) of the Privacy Act to the extent the records are subject to exemption pursuant to 5 U.S.C. 552a(k)(1) and (k)(2).

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2)--(1) Exemption (j)(2).* Records in this system of records may contain investigatory material compiled for criminal law enforcement purposes to include information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled during criminal law enforcement proceedings. Application of exemption (j)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties or disciplinary measures; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to

obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

(2) *Exemption (k)(1)*. Records in this system of records may contain information that is properly classified pursuant to executive order. Application of exemption (k)(1) may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security.

(3) *Exemption (k)(2)*. Records in this system of records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could: inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records or the accounting of records to avoid criminal penalties, civil remedies, or disciplinary measures; interfere with a civil or administrative action or investigation which may impede those actions or investigations; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others..

(B) *Subsection (c)(4), (d)(3) and (4)*. These subsections are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2). Accordingly, exemption from subsection (c)(4) is claimed pursuant to (j)(2) and exemptions from subsections (d)(3) and (d)(4) are claimed pursuant to (j)(2), (k)(1), and (k)(2).

(C) *Subsection (e)(1)*. In the collection of information for investigatory and law enforcement purposes it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances,

it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required disciplinary and prosecutorial determinations. Additionally, records within this system may be properly classified pursuant to executive order. Accordingly, application of exemptions (j)(2), (k)(1), and (k)(2) may be necessary.

(D) *Subsection (e)(2)*. To collect information from the subject individual could serve notice that he or she is the subject of a criminal investigation and thereby present a serious impediment to such investigations. Collection of information only from the individual accused of criminal activity or misconduct could also subvert discovery of relevant evidence and subvert the course of justice. Accordingly, application of exemption (j)(2) may be necessary.

(E) *Subsection (e)(3)*. To inform individuals as required by this subsection could reveal the existence of a criminal investigation and compromise investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(F) *Subsection (e)(4)(G) and (H)*. These subsections are inapplicable to the extent exemption is claimed from subsections (d)(1) and (2).

(G) *Subsection (e)(4)(I)*. To the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect the privacy and physical safety of witnesses and informants. Accordingly, application of exemptions (j)(2), (k)(1), and (k)(2) may be necessary.

(H) *Subsection (e)(5)*. It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to maintain an accurate record of the investigatory activity to preserve the integrity of the investigation and satisfy various Constitutional and evidentiary requirements, such as mandatory disclosure of potentially

exculpatory information in the investigative file to a defendant. It is also necessary to retain this information to aid in establishing patterns of activity and provide investigative leads. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined through judicial processes. Accordingly, application of exemption (j)(2) may be necessary.

(I) *Subsection (e)(8)*. To serve notice could give persons sufficient warning to evade investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(J) *Subsection (f)*. The agency's rules are inapplicable to those portions of the system that are exempt. Accordingly, application of exemptions (j)(2), (k)(1), and (k)(2) may be necessary.

(K) *Subsection (g)*. This subsection is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act. Accordingly, an exemption from subsection (g) is claimed pursuant to (j)(2).

(iv) *Exempt records from other systems*. In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

Dated: March 13, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

